

Docket No.05-0691
Bench Date: 2/8/06
Deadline: NA

MEMORANDUM

TO: The Commission

FROM: Terrance Hilliard, Administrative Law Judge

DATE: December 15, 2005

SUBJECT: Citizens Utility Board

Petition for an Investigation of ComEd's Participation in a Marketing Campaign by CORE that Threatens Consumers with Blackouts and Inquiry into the Ability of ComEd to Provide Reliable Electric Service.

RECOMMENDATION: Order Denying the Petition.

CUB's Petition

On October 26, 2005, the Citizen's Utility Board ("CUB") filed its petition with the Commission seeking an expedited investigation into Commonwealth Edison's ("ComEd") participation in "a public campaign threatening its customers with blackouts."

According to the petition, ComEd is active in an organization known as CORE, an acronym for Consumers Organized for Reliable Electricity. CORE has run television, print and direct mail advertisements warning of potential electric power reliability problems in Illinois, if Illinois politicians interfere unwisely with the established regulatory process. CUB asserts that a public utility, such as ComEd, should be prohibited from publishing statements such as those contained in these ads. CUB also asks the Commission to investigate the reliability of ComEd because of the statements made in the ads. CUB further requests that the Commission order ComEd to cease and desist from future advertising until the Commission determines whether "the reliability risks described in the petition really exist."

CORE is not an entity regulated by the Commission. CUB asserts that ComEd is Core's funding source. One ComEd employee, John Hooker, is on CORE's "Advisory Committee." This Committee also includes an array of businesspersons, academics, union officials and trade association representatives not employed by ComEd.

On October 31, 2005 Robert Kelter, Director of Litigation for CUB, sent an ex parte letter to each Commissioner suggesting that the Commission should consider the

petition en banc, on an emergency basis, rather than through the usual adversarial process, because the ad campaign in question might be of limited duration.

ComEd's Response

On November 1, 2005, ComEd filed a motion to dismiss the petition. In that motion, ComEd argues that the petition fails to allege a violation of the Public Utilities Act ("the Act"). It alleges that what CUB requests is an unconstitutional "prior restraint" on ComEd's exercise of its first amendment rights of free speech and freedom of association. That is, CUB wants the Commission to enjoin CORE/ComEd in advance from making any more statements that decry interference with deregulation by politicians or statements that imply that action by unnamed politicians may affect reliable electric service in Illinois. ComEd points out that neither the Courts nor agencies like the Commission can impose prior restraints of first amendment rights under normal circumstances.

The motion points out that CORE is not a regulated entity, therefore the Commission has no jurisdiction to order it to do anything. CORE's past, present or future written statements are not subject to Commission control.

ComEd is subject to the Commission's jurisdiction. However, it argues that nothing referenced in the petition is prohibited by the Act. ComEd concedes it is the principal contributor to CORE. ComEd argues that it has a Constitutional right to make those contributions and to support the views CORE expresses. That right is its right to freedom of association. It can support any point of view it wants. It has a right to participate in a political debate; i.e. its concern about interference by the governor with pending ComEd matters before the Commission. ComEd states that neither CORE nor ComEd's contributions to it are financed by ratepayers. Section 9-224 of the Act prohibits the Commission from allowing direct or indirect expenses for political advertising as a reimbursed ratepayer reimbursed expense.

ComEd points out that the basis for the petition is CUB's disagreement with the content of CORE's political speech. The statements that CUB objects to were not made by ComEd. ComEd argues that there is no statement referenced in the petition made by anyone at ComEd. ComEd says there is a quote from an Exelon employee taken out of context. That Exelon employee referred to lights staying on and not shutting down the nuclear plants. That statement was not made on the subject referenced in the CORE material. The statement concerned a proposal by a Regional Transmission Organization to change the way "capacity payments" are made.

ComEd argues that there is no basis in the petition for an instituting an investigation, let alone an emergency investigation. . ComEd argues that CORE has not asserted that its reliability is in jeopardy. The only emergency is that CORE's political speech may, according to CUB, be "limited in duration" and "escape CUB's attempts to stifle it."

ComEd argues that the issue of service reliability, if it fails to recover its costs, is already before the Commission in other dockets, see e.g., Dockets 05-0159 and 05-0597. Moreover, ComEd has made its annual reliability filing in Docket 05-0193. Therefore, another investigation would be duplicative and unnecessary.

CUB'S Response

CUB response to the Motion to dismiss focuses on whether ComEd's "threats" raise a legitimate reliability issue. CUB asserts that ComEd should not be allowed to "circumvent its responsibility to act in the public interest by hiding behind a front group."

CUB asserts that ComEd is claiming that political pressures may impact reliability. It is the Commission's responsibility to determine whether ComEd's ability to provide safe reliable service is in jeopardy. CUB asserts that the Commission should investigate to determine whether the statements made in the CORE ads are true. CUB apparently wants the Commission to investigate to determine if future political interference in ratemaking could affect ComEd's reliability or the cost of electricity. CUB points out that there is a direct connection between ComEd and CORE. It states that the Commission has jurisdiction over Exelon as it relates to these ads under the affiliated interest provisions of the Act. CUB does not allege the Commission has jurisdiction over CORE.

It argues that ComEd should be required to disclose the basis for the statements made in the ads. CUB asserts that it is not true that the proposed investigation would be duplicative of issues in the ComEd procurement Docket 05-0159. CUB says these concerns were never discussed in that case.

Staff's Position

Staff generally agrees with ComEd that some of the relief requested by CUB raises serious free speech issues and jurisdictional questions. Staff also believes that an investigation of potential reliability issues related to possible future legislative action is too speculative to be of any value.

Staff does note however that it is concerned that some of the ads imply that the outcome of Docket 05-0159 may affect reliability issues. Staff requested answers from ComEd (in this case) to questions about its reliability arising from Docket 05-0159 issues. ComEd provided answers to those questions that addressed Staff's concerns. Staff then requested a written statement from ComEd "that it has not advocated that the Commission's determination in Docket 05-0159 should be influenced . . . by potential service reliability concerns." Subject to receipt of that statement, Staff recommended that the Commission not commence the requested investigation. ComEd then provided the written statement requested by Staff. Because I have heard nothing further from Staff, I infer that Staff is satisfied with ComEd's response and recommends that the Commission should not open an investigation.

Analysis and Recommendation

CUB's petition wants two things. First, it requests that the Commission Order ComEd to stop ads run by a corporation not regulated by the Commission. CUB disagrees with the point of view expressed in these ads and requests that the Commission order them stopped until an investigation has determined whether the statements made therein are true. If such an order were enforceable, the time required for the subsequent investigation after the ad ban would probably make further ads, after the conclusion of the investigation, moot.

The ads in question address an issue of public and political interest: i.e. Could political action affect the ability of utilities to provide reliable electric service at affordable rates in Illinois? The ads are constitutionally protected speech. As ComEd points out, CUB is requesting a prior restraint on CORE's first amendment right to free speech and ComEd's first amendment right to associate with and provide financial support for a separate entity expressing political views. Such an order would be unconstitutional. ComEd is correct that there is nothing in the Act that could justify a restraining order by the Commission under these circumstances. Moreover, CORE is the party running the ads. The Commission has no power to order CORE to do anything.

Second, CUB requests an investigation of potential electric supply reliability arising from statements made in the ads. The gist of the statements in the ads is: Future political action (presumably by the Governor or the General Assembly) impacting the electric utility rate making process, may adversely affect ComEd's finances and its ability to continue to supply electricity at reasonable rates. Therefore, CUB wants the Commission to investigate whether there is any truth to the assertion that unspecified future action by the General Assembly or the Governor could adversely affect ComEd's bottom line so greatly that it would not continue to be a reliable source of electricity.

As Staff argues, such an investigation would be: 1) highly speculative because the Commission does not know what action might be taken; and, 2) because the General Assembly controls the Commission, rather than the other way around, pointless. That is, the Commission has no authority to tell the General Assembly or the Governor what they can do, so nothing constructive would come of looking into what they might do. ComEd has also satisfied Staff's concern that it has not advocated that the Commission's decision in Docket 05-0159 be influenced by potential service reliability concerns.

CUB argues that the Commission can restrain "commercial speech" if it is misleading or deceptive. Commercial speech is communication that involves marketing or the advertising of products or services. It is true that there is limited constitutional protection afforded to commercial speech. The state can regulate it. However, CUB does not cite any cases or statutes that trump ComEd's first amendment arguments. CUB's only legal authority is Friedman v. Rogers, a 1979 Supreme Court case that upheld a Virginia statute prohibiting optometrists from practicing under trade names because such names might be deceptive. That case is just not on point. There is no

similar statute at issue in this case. CORE's statements are not intended to sell a product or service. CORE's ads warn that allowing ratemaking to be influenced by political pressures could affect the financial viability of the electricity business in Illinois. The statements at issue are political speech. Regardless of its source of funding, the point of view expressed in CORE's ads is political speech entitled to constitutional protection.

There is nothing in the Act that would allow the Commission to stop these ads. ComEd's customers are not paying for them. ComEd is not publishing them. CORE is not ComEd. CORE is not a regulated entity. The Commission has no authority over CORE. CORE has a right to publish its views and ComEd has a right to fund CORE. Furthermore, I concur with Staff's opinion that such an investigation would serve no purpose.

Accordingly, I recommend that the Commission deny the Petition.

TAH: fs